Ganapathy a/l Rengasamy v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-107 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR FCJ AND SHAIK DAUD JCA
18 JUNE 1997 AND 3 FEBRUARY 1998

Criminal Law *— Dangerous Drugs — Trafficking — Statutory presumption — Onus on appellant to rebut presumption of possession on a balance of probabilities — Whether appellant succeeded in rebutting presumption — Whether prosecution had proved beyond reasonable doubt that the appellant knew the bag contained drugs — Dangerous Drugs Act 1952 s 37(d) & (da)*

On 12 May 1989 at about 5pm, as a result of information received, a police party laid an ambush at Jalan Kepong, Jinjang North. The appellant at this time was coming out of a lane towards Jalan Kepong and he had with him a dark maroon bag (exh P4) under his armpit. The appellant walked to the edge of Jalan Kepong, stopped and boarded a mini bus going in the direction of Kuala Lumpur. The entire police party then boarded the bus. In the bus, it was alleged that the appellant was seated alone with the bag he was earlier carrying placed on an empty seat next to him. When the bus stopped and the appellant alighted carrying the bag with him, the police party followed him and subsequently arrested him. Investigations revealed that the bag carried by the appellant contained heroin weighing 134.84gm. The appellant was convicted by the High Court for an offence of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and was sentenced to death. The appellant in his defence gave evidence on oath. He testified that the bag was given to him to hold by his employer, one Rahman bin Noh @ Ah Kiong, who was on the bus with the appellant. While admitting he was carrying the bag, the appellant vehemently denied any knowledge that the bag he was carrying contained the drugs.

Held, by a majority, allowing the appeal:
On the evidence adduced, there were many material questions left unanswered by the prosecution in this case. Coupled with the trial judge's failure to address material aspects of the defence's case, there had been a serious misdirection by way of non-direction. On the totality of the case, the appellant had rebutted, on the balance of probabilities, the presumption under s 37(d) of the Act (see p 588B–C); *Mat v PP* [1963] MLJ 263 and *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 followed.

[Bahasa Malaysia summary

Pada 12 Mei 1989 kira-kira 5 petang, ekoran daripada maklumat yang diterima, sepasukan polis telah mengatur serang hendap di

Jalan Kepong, Jinjang Utara. Pada masa itu, perayu keluar daripada suatu lorong menuju Jalan Kepong dan dia membawa sebuah beg berwarna merah manggis gelap (eks P4) di bawah ketiaknya. Perayu telah berjalan ke pinggir Jalan Kepong, berhenti dan menaiki bas mini yang menuju ke Kuala Lumpur. Kesemua ahli pasukan polis kemudiannya menaiki bas itu. Dalam bas itu, adalah dikatakan bahawa perayu duduk bersendirian dengan beg yang dibawanya lebih awal terletak atas tempat duduk di sebelahnya. Apabila bas itu berhenti dan perayu turun dengan membawa beg, pasukan polis telah mengekorinya dan kemudian menangkapnya. Siasatan menunjukkan bahawa beg yang dibawa oleh perayu mengandungi heroin seberat 134.84gm. Perayu disabit oleh Mahkamah Tinggi untuk kesalahan pengedaran di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'), dan dijatuhkan hukuman mati. Perayu dalam pembelaannya telah memberi keterangan bersumpah. Dia mendakwa bahawa beg itu diberikan kepadanya untuk dipegang oleh majikannya, seorang bernama Rahman bin Noh @ Ah Kiong, yang berada dalam bas dengan perayu. Manakala mengakui dia membawa beg itu, perayu secara bersungguh-sungguh menafikan apa-apa pengetahuan bahawa beg yang dibawanya mengandungi dadah tersebut.

Diputuskan, mengikut majoriti, membenarkan rayuan:
Atas keterangan yang dikemukakan, terdapat banyak persoalan material yang dibiarkan tidak terjawab oleh pihak pendakwaan dalam kes ini. Disertai dengan kegagalan hakim perbicaraan untuk menumpukan perhatian kepada aspek material kes pihak pembelaan, terdapat salah arah yang serius menerusi ketidakarahan. Pada keseluruhan kes, atas imbangan kebarangkalian, perayu telah mematahkan anggapan di bawah s 37(d) Akta tersebut (lihat ms 588B–C); *Mat v PP* [1963] MLJ 263 dan *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 diikut.]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52 and 57–64.

List of cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Balasingam v PP [1959] MLJ 193 (refd)
Leow Nghee Lim v R [1956] MLJ 28 (refd)
Mat v PP [1963] MLJ 263 (folld)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Murugiah v PP [1941] MLJ 17 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(3), 37(d), (da), 39A(2), 39B(1)(a)

Appeal from: Criminal Trial No 47–29–89 (High Court, Kuala Lumpur)

Bhagwan Singh (*Bhagwan Singh*) for the appellant.
Abang Iskandar bin Abang Hashim (Deputy Public Prosecutor) for the respondent.

3 February 1998

Chong Siew Fai CJ (Sabah & Sarawak): At the conclusion of the hearing before us and after a short deliberation, Edgar Joseph Jr FCJ and Shaik Daud JCA allowed the appeal, quashed the conviction and set aside the sentence of death. I differed from them with regret. We indicated that reasons for our different conclusions would be given. I now give mine.

I do not propose to repeat the history and the facts of this case, which have already been clearly rehearsed in the judgment of Shaik Daud JCA.

For convenience, I shall call the appellant 'the accused'.

Grounds of appeal

Altogether there were eight grounds of appeal as follows:

(A) The learned trial judge erred in:

(a) convicting the accused under s 39B of the Dangerous Drugs Act 1952 ('the Act');

(b) convicting the accused since there was no clear, direct evidence showing that he had knowledge, custody and control of the drugs;

(c) failing to consider that the existence of a third party, one Abdul Rahman bin Noh alias Ah Kiong, who was also arrested on a charge of drug trafficking, had created a doubt in this case;

(d) failing to consider *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169;

(e) failing to consider that based on the accused's information, a third party, one Abdul Rahman bin Noh alias Ah Kiong, the real trafficker, was arrested by the police;

(f) accepting the identification of the accused by prosecution witnesses from a distance of 100m in a busy town; and

(g) believing the evidence adduced by the prosecution that six persons got into a Proton Saga car when returning to the office of Cawangan Anti Dadah.

(B) The conviction was against the weight of evidence.

However, arguments on behalf of the accused were not advanced specifically on the grounds enumerated above. Nevertheless they may be grouped as follows:

(i) The accused's possession of exh P4, the bag containing the heroin;

(ii) The existence of Abdul Rahman bin Noh alias Ah Kiong;

(iii) The place of arrest of the accused; and

(iv) The non-application of the directions enunciated in *Mohamad Radhi bin Yaakob v PP* by the learned trial judge.

(i) *The accused's possession of exh P4, the bag containing heroin*

Learned counsel for the accused submitted that the accused had no knowledge of the contents of the bag. The defence of the accused was that one Abdul Rahman bin Noh alias Ah Kiong, his employer, 'framed' him in that the employer boarded the bus together with him and gave him the said bag just before both of them alighted from the bus. However, the prosecution witnesses PW3, Det Constable Chang Sing Kong who followed the accused and boarded the bus, and PW8, Insp Lai Joo Wah who followed the bus in a car, denied this. They said the accused boarded the bus alone, carrying a bag.

The learned trial judge, after considering the evidence of the whole case, found that the accused was in custody and control of the bag and had failed to rebut the presumptions of possession and knowledge under s 37(d) of the Act. Going through the evidence, I was inclined to agree with the learned trial judge. The following evidence which supported his finding ought not, in my view, be overlooked. Both PW3 and PW8 testified that on 12 May 1989 at about 5 pm, when they, at a distance of 100m, saw the accused turning into Jalan Kepong until he boarded the bus from Kepong to Kuala Lumpur, he was alone, carrying the bag (exh P4) under his armpit.

Admittedly, there were some discrepancies in the description of the colour of the bag: PW3 at first said that it was red and later said that it was maroon red; PW8 described it as of dark coloured while the accused, in his defence, said that the bag he was carrying was brown in colour. But PW3, who boarded the bus following the accused and trailed the latter throughout the journey, positively identified the said bag (exh P4) as the one carried by the accused when he first saw him, as the same one the accused took when he boarded the bus, and again, as the same one the accused was caught with after alighting from the bus. Furthermore, PW8, who followed the accused in a car and to whom PW3 handed the bag soon after it was seized from the accused, positively identified the bag based on the marking 'Mayte Product No 770' thereon. And it was in the very bag that the 134.84gm of heroin was subsequently found. There is, therefore, clear evidence that exh P4 was the very bag carried by and seized from the accused when he was arrested by the police and it was the very same bag which was later found to contain 134.84gm of heroin as stated in the

charge. The learned trial judge accepted PW3 and PW8 as witnesses of truth. He accepted that the accused held the bag from the time the police first saw him, then in the bus and that the accused was still holding it when the police approached to arrest him. Upon the police intending to effect the arrest, the accused dropped the bag and attempted to run away. There is, therefore, ample evidence justifying the finding by the learned trial judge that the bag (exh P4) containing the heroin was in the custody and control of the accused at the material time. Hence, the presumption of possession of the drug and knowledge of the nature thereof under s 37(d) of the Act arose.

(ii) *Existence of Abdul Rahman bin Noh alias Ah Kiong*

The story of the accused was that he and his employer, one Rahman bin Noh alias Ah Kiong ('Rahman'), boarded the bus together, that in the bus Rahman handed to him the bag, that he did not ask Rahman about the content of the bag and that at Jalan Tun Perak, he alighted from the bus as indicated by Rahman, and was then arrested by the police.

There can be no question that Rahman existed because it was in the evidence of the prosecution that he had been arrested for a drug offence though different from the one herein faced by the accused. Moreover, Rahman had in fact been subpoenaed by the prosecution in this case though neither the prosecution called him to testify nor the defence, when he was offered.

The fact that Rahman existed, however, need not necessarily mean that the story of the accused that Rahman was with him at the material time on 12 May 1989 is also true. Both PW3 and PW8 clearly observed the accused from the moment the accused was first spotted along Jalan Kepong. Moreover, PW3, following the accused, also boarded the bus, sat behind the accused and observed him. At the trial, both PW3 and PW8 maintained and were unshaken under cross-examination that from the time they first saw the accused till he boarded the bus he was alone. PW3 persisted in his assertion that the accused was alone in the bus and that no one handed any package to the accused while the latter was seated in the bus. The defence of the accused which his counsel put during the prosecution case was vehemently denied by the prosecution witnesses, particularly PW3 and PW8.

Moreover, as pointed out by the learned deputy public prosecutor, the evidence of PW8 was that the police informer was brought along when PW8 and his men were in vigilance, for the sole purpose of pointing out the 'target' to them, and the informer did in fact identify the accused to PW8 amongst the people in the area. PW8's evidence on this point was not challenged. Although learned counsel for the accused had asked PW3 in cross-examination whether the police 'target' that day was Rahman and not the accused, PW3 denied the suggestion. The defence in this case was simple. The learned trial judge, by rejecting the defence contention that Rahman wanted to fix the accused and finding that the accused had custody and control of the bag (exh P4) containing the heroin, had

obviously accepted as true the evidence of PW3 and PW8 whom he had found truthful. At the appellate stage, I did not think the factual conclusion ought to be lightly disturbed except for good reason, which, in my opinion, there was none.

As for the contention of the accused that the information given by him after his detention resulted in the arrest of Rahman, it was not disputed by the prosecution. However, on the evidence as accepted, Rahman's involvement in drug activities had no bearing on nor could it exonerate the accused from the charge he faced in the instant case.

In my view, the learned trial judge was amply justified in rejecting the defence of the accused and in concluding that the latter had failed to rebut the presumption under s 37(d) of the Act.

(iii) *Place of accused's arrest*

In the submission on behalf of the accused, much was made of the fact that the police let the accused proceed all the way from Kepong to Kuala Lumpur before arresting him, when, it was contended, they could have apprehended him while he was waiting for the bus in Kepong or while he was in the bus. In my view, no material significance could be validly attached to the deferment in the arrest of the accused. It was simply a question of timing respecting which PW3 and PW8 were in the best position to assess. They said that they could not arrest the accused while he was waiting for the bus because of the distance between them and the accused and of the possibility that the accused might escape if any movement led him to suspect that the police were after him. I considered the explanation reasonable as indeed was illustrated by what subsequently happened when the police closed in on him in front of the bank in Kuala Lumpur.

As for not arresting the accused in the bus, PW8 explained that the arrest would entail the bus driver and the other passengers in the bus being subpoenaed to give evidence. While it might not be necessary to call every one on board the bus as witnesses, I saw the plausibility of the reasoning that some of the people in the bus would probably be required by the prosecution to testify on its behalf respecting the arrest or matters pertaining thereto, had the arrest been effected in the bus. In any event, in matters such as this when decisions to be made were very much dependent upon circumstances and conditions there and then prevailing, one could not but rely on the judgment of the police to do what they considered to be prudent and expedient, and, except for some good reasons, their decisions should be accepted as they were trained in covert jobs.

(iv) *The non-application of the direction enunciated in Mohamad Radhi bin Yaakob v PP*

In *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, paras (d) and (da) of s 37 of the Act were invoked, and the Supreme Court laid down that it was incumbent upon the trial court to consider whether, on the balance of

probabilities, the evidence of the defence had rebutted the statutory presumption of trafficking under the said para (da) as a separate exercise even though the court was satisfied on balance that the presumption of possession under the said para (d) had not been rebutted. However it is not in all such cases that the trial judge must do so. Mohd Azmi SCJ, in delivering the judgment of the court, qualified the requirement with the words '*unless the evidence in a particular case does not obviously so warrant*' (p 172).

Having considered the overwhelming evidence in this case including the carrying of the bag (exh P4) containing the heroin by the accused and the rejection of the defence story, and having regard to the definition of 'trafficking' under s 2 of the Act which included 'carrying', I was, contrary to the defence contention, of the view that the failure of the learned trial judge to embark on a separate exercise of the presumption under s 37(da) was not fatal in this case.

Based on the foregoing, I had, at the conclusion of the appeal, dissented from the majority decision which allowed the appeal in total, quashed the conviction and set aside the death sentence.

Post-appeal development

Since the decision in this appeal, the Federal Court, comprising Edgar Joseph Jr FCJ, NH Chan JCA and myself, had decided in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 that on the wording of para (da) of s 37 of the Act as it stands, it was not permissible, in a charge of drug trafficking, to apply automatically the said para (da) (presumption of trafficking) upon mere invocation of para (d) (presumption of possession and knowledge) of the same section.

A perusal of the judgment of the lower court in the instant case revealed that the learned trial judge had likewise erred in invoking the presumption under s 37(da) though the point was not raised in the instant appeal before us. In the light of the decision in *Muhammed bin Hassan v PP*, this appeal, in my opinion, should have been allowed in part by quashing the conviction under s 39B(1)(a) of the Act, setting aside the death sentence, and substituting therefor a conviction under s 12(3) and imposing a sentence as authorized under s 39A(2) thereof.

18 June 1997

Shaik Daud JCA: By a majority decision we had allowed this appeal, quashed the conviction and set aside the sentence of death. We indicated then that we would give our reasons in writing and this we now do.

On 27 October 1993, the Kuala Lumpur High Court convicted the appellant for an offence of trafficking in 134.84gm of heroin, under s 39B(l)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was accordingly sentenced to death. This was the second time the appellant was before this court. The appellant was previously charged with the same offence before another judge of the Kuala Lumpur High Court on 11 August

1991. At the close of the case for the defence on 14 March 1991, the appellant was acquitted and discharged. On appeal by the Public Prosecutor, the Supreme Court, on 4 January 1993, allowed the appeal and ordered a retrial before another judge. At the outset of this appeal, Mr Bhagwan Singh, assigned counsel for the appellant submitted that, the fact that the appellant had to undergo two trials on the same charge, with the same set of witnesses and being acquitted at one and convicted at the other, is in itself an indication of a grave doubt having been created. The learned deputy public prosecutor ('DPP') submitted that the issue before the Supreme Court was whether the burden on the defence was on a reasonable doubt or on a balance of probability. We hold that, whatever may be the reasons for the order of the re-trial, that by itself does not indicate any doubt.

The facts leading to the arrest of the appellant are that on 12 May 1989, as a result of information received, Insp Lai Joo Wah ('SP8') led a police party consisting of DPC 109669 Cheng Siang Kong ('SP3'), D/Constable Woon Tan Seng ('Woon') and D/Constable Mohamad Shahar ('Shahar') to lay an ambush at Jalan Kepong, Jinjang North. It would appear that the informer was also with the police party and it was he who pointed out the appellant as the target. SP3 testified that at about 5pm that day, while he and Woon were by the side of Jalan Kepong, Shahar joined them and told them that the target had come out. At the same time, SP3 said he saw the appellant alone some 100m away coming out of a lane towards Jalan Kepong and he had with him a dark maroon bag under his armpit. Later SP3 said it was a red bag but corrected himself and said it was a dark maroon bag. SP3 said that the appellant walked to the edge of Jalan Kepong, stopped and boarded a mini bus going in the direction of Kuala Lumpur. The bus then proceeded towards where SP3 and Woon were and when it arrived near them, SP3 stopped the bus and the entire police party boarded the bus. In the bus, SP3 said he saw the appellant seated alone with the bag he was earlier carrying placed on an empty seat next to him. SP3 testified that he and two other police personnel sat behind the appellant. How SP3 and two other police personnel could sit behind the appellant was not explained as all seats on buses, we believe, are for two persons. The bus proceeded all the way to Jalan Tun Perak and when it stopped at a traffic light in front of the Ban Hin Lee Bank, SP3 said the appellant alighted carrying the bag with him. SP3 and the other two police personnel also alighted. The appellant walked towards Ban Hin Lee Bank and when he arrived in front of the bank, Woon stopped him and identified himself as the police. SP3 said that at that time, the appellant dropped the bag and started to struggle to free himself. SP3 picked up the bag. Then SP8, who had been following the bus in a car, arrived and all three police personnel with the appellant were taken in the car to the Police Contingent Headquarters Kuala Lumpur. Investigations revealed that the bag carried by the appellant contained heroin weighing 134.84gm as confirmed by the government chemist Ree Sue Sing ('SP7').

The appellant in his defence gave evidence on oath. He testified that the day in question was his son's birthday and while he was at home, his employer, a Chinese convert by the name of Rahman bin Noh @ Ah Kiong ('Rahman'), came to his house wanting him to do a job of painting

A a house in Jinjang. He said he followed Rahman to go and see the house that needed painting and when they could not find the owner of the house he and Rahman went to a coffee shop. There Rahman met with another person and he saw Rahman take a brown bag from his car. Then he and Rahman decided to take a bus home. According to the appellant, he and Rahman boarded the bus. In the bus, Rahman was still holding the brown B bag. During the journey and just before he alighted, he said Rahman gave him the brown bag to hold which he did. Rahman being his employer, this act came naturally and no questions were asked. Then Rahman signalled to him to alight and as he was doing so, someone held him at the waist band from behind and as a result he fell down and was apprehended and C handcuffed. Then he discovered he was arrested by the police. While admitting he was carrying the bag, he vehemently denied any knowledge of its content. In other words, the defence is one of an innocent carrier.

First and foremost, we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in D that they do not convey a 'speaking' judgment although the importance of this has been stressed in a number of decided cases. (See, for example, *Balasingam v PP* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v PP* [1941] MLJ 17 per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. E He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.

It needs to be remembered that however weak a defence may be, trial F judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the G court's duty to consider the defence, the age old decision in *Mat v PP* [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169.

In *Leow Nghee Lim v R* [1956] MLJ 28, a case of possession of opium, H Taylor J expounded on and discussed the word 'possession'. At p 30 of his judgment he said:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

I And at p 31 of the judgment he continued:

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

These propositions of law are as good today as they were in 1956. A

The burden on the prosecution throughout is to prove their case beyond a reasonable doubt (see *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1.) But once the prosecution had proved that the appellant had custody or control of the bag containing the drugs in question, then by s 37(d) of the Act, he was deemed to have been in possession of such drugs B and to have known the nature of such drugs and so, the onus shifted to him to prove the contrary on the balance of probabilities. (See *PP v Yuvaraj* [1969] 2 MLJ 89.)

We have set out the appellant's defence above and from the defence, he admitted he was carrying the bag in which the drugs were later found C by the police, and he also explained the circumstances in which he came to be holding the bag, but he says that he had no knowledge whatsoever that the bag he was carrying contained the drugs. At the close of the case for the defence, had the prosecution proved beyond a reasonable doubt that he knew the contents of the bag to be drugs? Based on the totality of the evidence, it is our considered view that there is no affirmative evidence D whatsoever that the appellant knew he was carrying heroin, only the presumption under s 37(d) of the Act says so and he has rebutted it by his own denial on oath.

The appellant in his defence says that he boarded the bus not alone but with his employer Rahman and that he was then not carrying the bag. E First of all, let us see if this character Rahman exists. It is not uncommon for accused persons in drug trafficking cases to mention the presence of a third person but in most of those cases the alleged third person either does not exist at all or could never be traced. In this case, however, the character Rahman did in fact exist. As a result of the appellant's information given during an interrogation after his arrest, Rahman bin Noh @ Ah F Kiong was in fact apprehended by the police and subpoenaed by the prosecution but at the close of the prosecution's case, was made available to the defence. The investigating officer Insp Saumi bin Man ('SP1') confirmed that the Rahman arrested and made available was the same Rahman — the appellant's employer. He also confirmed that Rahman was G charged for trafficking in 10 pounds of heroin and was convicted and sentenced to death by another High Court. He also confirmed that Rahman was arrested based on the information given by the appellant and that the appellant had stated that the bag he was carrying belonged to Rahman. From this, it seems clear to us that Rahman is not a figment of the appellant's imagination but actually existed. In spite of this, the learned H judge made no finding as to the existence or otherwise of Rahman. Nowhere has the learned judge made a finding as to whether Rahman was at the scene as testified by the appellant.

No doubt SP3 said that he saw the appellant alone boarding the bus as opposed to the appellant's version that Rahman also boarded the bus. I This version by the appellant is not improbable, given that the police personnel were quite a distance away, and the fact that the particular area in question, ie Kepong at 5pm, would be busy with people and vehicles at

A that time of the day and given that the police were concentrating on the appellant, they could well have not been aware of others in the vicinity.

Next, the appellant says that when he boarded the bus he was not carrying the bag. Again the learned judge made no finding on this. Now the police party was some 100 to 150m away when the appellant was first B pointed out to them as the target. From this distance, according to the evidence of SP3, he could see the appellant had a bag 'warna perang tua' (dark maroon) under his right armpit. It is rather surprising that from that distance, he could see even the precise colour of the bag under the appellant's right armpit. A photograph of the bag revealed that it was not such a big bag. It was rather a small flat bag and if held under one's armpit, C we believe SP3 could not be able to say what it was in the first place, let alone its precise colour. Incidentally, the colour of the bag was not dark maroon but actually brown as testified by the appellant. Again the learned judge made no finding on this even though it was raised in submission.

The scenario established by the police witnesses seems to be that while D they were in ambush position, the informer identified the appellant as the target as he was coming out of a lane and the police saw the appellant alone with a dark maroon bag under his right armpit. In the light of this, the nagging question is why did they not spring the trap and apprehend the appellant then? As a matter of fact, SP3 did supply the answer. He said that if they tried to arrest him, then in view of the distance between him E and the police, the chances of him absconding cannot be ruled out. Whilst this explanation may appear to be credible, we cannot but say that there were four police personnel in the vicinity and one of them was in a car, while the appellant was allegedly alone and on foot. The next question which seems to nag our minds is that, even if they could not apprehend F him before he boarded the bus because of the distance between them, they were offered a second opportunity, in fact a better opportunity, to apprehend him, with the goods, so to speak, when the very same bus with the 'target' in it came to where the police personnel were in ambush. The police personnel even boarded the same bus and they saw the appellant with the same bag and yet they did not apprehend him. The explanation given by G Insp Lai this time borders on absurdity. He said that if an arrest was made in the bus then the police may have to record the statements of everyone in the bus and all of them have to be called as witnesses. Why this has to be so was never explained. The appellant was only arrested about seven miles away from the spot he was first seen with the alleged offending bag. H There was no reasonable explanation for this. The learned judge too did not find this odd; in fact, he made no comment on this.

The fact that the target had been identified, was seen allegedly alone carrying a bag, was neither immediately apprehended nor later when the police personnel boarded the bus and saw the target with the bag, lend credence to the appellant's defence that when he was walking towards the I main road to board the bus, he was not carrying the bag and the bag was only given to him on the bus before he alighted. If he was so seen as claimed by SP3, the police would not have hesitated to apprehend him.

The defence also lend credence to the assertion that the appellant was in fact not the target but probably someone else was. This someone else could well be Rahman who was in fact later arrested as a result of information given by the appellant. According to the appellant, Rahman was in the bus that day.

We find there are many material questions left unanswered by the prosecution in this case and coupled with the learned judge's failure to address material aspects of the defence's case, there has, in our view, been a serious misdirection by way of non-direction. It is our considered finding that on the totality of the case, the appellant has rebutted the presumption under s 37(d) of the Act, on a balance of probabilities. The appellant has established that even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its contents. The learned judge failed to give consideration to this aspect of the defence. We therefore allowed the appeal, quashed the conviction and set aside the sentence. We ordered the appellant to be acquitted and discharged.

Appeal allowed. Conviction quashed, sentence of death set aside and the appellant acquitted and discharged.

Reported by David Lai